No. 48970-8-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LA INVESTORS, LLC d/b/a LOCAL RECORDS OFFICE and ROBERTO ROMERO, a/k/a JUAN ROBERTO ROMERO ASCENCION, individually and as a Member and Manager of LA INVESTORS, LLC, and on behalf of the marital community comprised of Roberto Romero and Laura Romero; and LAURA ROMERO, individually and as a Member and Manager of LA INVESTORS, LLC, and on behalf of the marital community comprised of Roberto Romero and Laura Romero,

Appellants.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
Honorable Mary Sue Wilson

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

This Court should grant summary judgment in LRO's favor. As a matter of law, reasonable consumers would not likely have been misled to believe that LRO's mailer was a bill from a government agency. The mailer clearly offered a product for purchase, and its disclosures were adequate to remedy any potential confusion.

Regardless, this Court should reverse the summary judgment granted to the State. Although the State ostensibly admits that review of a summary judgment is de novo, it evidently seems to forget that this means the reviewing court, like the trial court, considers all facts and reasonable inferences in the light most favorable to the nonmoving party. Indeed, the State's brief reads more like a closing argument to a trier of fact than a summary-judgment argument. Capacity to deceive is a fact question, and the State failed to establish such capacity as matter of law.

II. REPLY ARGUMENT

A. LRO is entitled to summary judgment that its solicitation was not likely to mislead reasonable consumers.

1. As a matter of law, LRO's mailer was not misleading.

The State does not respond directly to LRO's request that this Court direct entry of summary judgment in its favor. This

Court should grant that request. Reasonable minds could conclude only that LRO's solicitation was not likely to mislead reasonable consumers because the solicitation (1) on its face was not misleading and (2) contained clear and conspicuous disclosures.

(a) The mailer clearly offered a product for purchase.

LRO's mailer, on its face, was not misleading to a reasonable person. It clearly communicated an offer to buy a copy of a deed and a property profile—nothing more, nothing less. Although the State derides the property profile as less detailed than competing products, the quality of the property profile is not relevant to the State's allegation in this case, *i.e.*, that the mailer had the capacity to deceive a substantial portion of the public that it was a bill from a government agency. The State never alleged the mailer was deceptive about the product or that LRO failed to deliver the items as described in the solicitation items to every consumer who ordered them. (It is worth noting, however, that only 0.6% of LRO's Washington consumers requested refunds. CP 330, 487-89, 748.)

(b) The mailer's disclosures were adequate to remedy any potential confusion.

The State wrongly implies that disclosures, as a matter of law, are never effective. Clear and conspicuous disclosures can

correct a misleading impression. *Encyclopaedia Britannica, Inc. v. FTC*, 605 F.2d 964, 970-71 (7th Cir. 1979). Disclosures cannot be ignored in evaluating capacity to deceive under the "net impression" test; rather, one must view the communication as a whole. Br. App. 24, citing cases, including *Panag v. Farmers Ins. Co. of Wash.*, 155 Wn.2d 27, 50, 204 P.3d 885 (2009).

The State cites several cases where disclosures or disclaimers were found ineffective in printed communications. Those cases are so readily distinguishable that they support summary judgment for LRO. Each one involved "fine print" or otherwise inconspicuous messages. For instance, in *FTC v. Cyberspace.Com, LLC*, 453 F.3d 1196 (9th Cir. 2006), the appellate court affirmed summary judgment for the FTC where "no reasonable factfinder could conclude" that fine-print on the back of a check was sufficient to disclose that cashing or

depositing it would constitute agreement to pay a monthly fee for Internet access. *Id*. at 1200-01.[1]

No reasonable comparison can be made with LRO's solicitation. Despite citing only cases involving inconspicuous disclosures, the State does not dispute that LRO's multiple disclosures were at least as prominent as any other text and in at least the same-sized font. Br. App. 37-38. No reasonable person who read the mailer could conclude that it was a bill from a government agency. Among the disclosures were these: "THIS OFFER IS NOT BEING MADE BY ANY AGENCY OF THE GOVERNMENT. THIS IS NOT A BILL. THIS IS A SOLICITATION AND YOU ARE UNDER NO OBLIGATION

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[1] Per Br. Resp. 24-25, *see also Panag*, 166 Wn.2d at 50 (concluding that a communication entitled "Formal Collection Notice" and threatening penalties failed effectively to disclose its true nature by *inconspicuously* disclosing it was an attempt to pursue an insurance subrogation claim); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42-43 (D.C. Cir. 1985) (affirming determination after trial that "inconspicuous," "virtually illegible," and "fine-print" disclaimer explaining how cigarette tar content was measured was ineffective to counteract deceptive message); *Floersheim v. FTC*, 411 F.2d 874, 876-77 (9th Cir. 1969) (affirming for substantial evidence FTC finding that consumers would be "unlikely to notice...or understand" an "inconspicuous" disclaimer on a skip-tracer form that mimicked an order to appear from the federal government); *Indep. Directory Corp. v. FTC*, 188 F.2d 468, 470 (2d Cir. 1951) (affirming FTC finding that solicitation disguised as renewal notice was deceptive notwithstanding fine-print disclosure); *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1065 (C.D. Cal. 2012) (observing that disclaimers do not "automatically" counteract a deceptive representation and concluding after a 16-day trial that the defendant's disclaimers "buried" in fine print at the bottom of a web page were insufficient), *vacated in part on other grounds*, 815 F.3d 593 (9th Cir. 2016).

TO PAY THE AMOUNT STATED, UNLESS YOU ACCEPT THIS OFFER." CP 718.

2. The State failed to raise a genuine issue of material fact on capacity to deceive.

The State offers three ostensible bases for its argument on capacity to deceive, none of which raises a genuine issue of material fact, let alone establishes capacity to deceive as a matter of law.

(a) The State presented no evidence of similarity to a government communication.

First, without citing the record or authority, the State argues that LRO's mailer was likely to mislead reasonable consumers because it supposedly had several elements one might expect to see in a government communication but not a solicitation. This argument is unfounded and incapable of raising a genuine issue of material fact because the State points to no evidence to support its fundamental premises, *i.e.*, that these elements (1) appear or would reasonably be expected to appear in government documents and (2) are not typical of marketing materials. Ultimately, the State's apparent argument—that LRO's mailer does not look as the State deems advertisements should—is not a proper basis to impose CPA penalties.

(b) Declarations from recipients who acted on the mailer without reading it are not evidence of the perceptions of reasonable consumers.

Next, the State cites its recipient declarations, asserting that "many" believed the mailer was from the government and that they had to respond. Br. Resp. 23. But as pointed out in Appellants' Opening Brief, there is no evidence that any of the 19 declarants who claimed to have been deceived by the mailer actually read it. Br. App. 12-13. Indeed, the declarations suggest the opposite, as no reasonable person who read the mailer could have reached the conclusions they did, *e.g.*, that the mailer was a tax bill or threatened fines or other penalties. *See id*. According to the FTC, "An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject[.]" *FTC Policy Statement on Deception* (Oct. 13, 1983), 103 F.T.C. 110, 178 (1984) (quoting *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963)). No one testified to being confused after having read the entire mailer.

The perceptions of those who would act on a text-only mailer without reading it cannot be deemed evidence of capacity to deceive. Certainly, a mailer's design can itself contribute to a deceptive message. But again, the State presented no evidence of similarity to a government communication. The State does

not dispute that one who accepts an offer is bound by its written terms even if he or she chooses not to read them. *See* Br. App. 27-28. The only question is whether those terms were reasonably clear. As a matter of law, they were.

(c) The State's expert's opinions on capacity to deceive were not "helpful" under ER 702 and were inadequately founded.

Finally, the State relies on the opinions of its purported expert witness, Dr. Pratkanis. Br. Resp. 23-24. In response to LRO's challenge that Dr. Pratkanis' opinions were not "helpful" under ER 702 (because the perceptions of a reasonable consumer are within the average layperson's knowledge), the State points only to his qualifications, which are irrelevant because qualification and helpfulness are separate issues under ER 702.[2] *See State v. Cauthron*, 120 Wn.2d 879, 890, 846 P.2d 502 (1993) (stating qualification and helpfulness as two separate issues), *overruled on other grounds by State v. Buckner*, 133 Wn.2d 63, 941 P.2d 667 (1997). The trial court abused its discretion in considering Dr. Pratkanis's opinions on the perceptions of a reasonable consumer, and this Court should disregard them.

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[2] LRO objects to the State's citation to Wikipedia to supplement the record on Dr. Pratkanis's qualifications. Br. Resp. 30 n.6. The State has not complied with RAP 9.11.

The State incorrectly asserts that LRO failed to raise its ER 702 objection in the trial court. LRO objected specifically on this basis in response to the State's summary-judgment motion. CP 1008-09 ("[Dr. Pratkanis's] opinion is demonstrably unscientific and thus is not admissible under ER 702."). LRO was not required to move to "strike" Dr. Pratkanis's declaration; an objection is sufficient to preserve the issue. *Bonneville v. Pierce County*, 148 Wn. App. 500, 508-09, 202 P.3d 309 (2008); *see also Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009) (observing that summary judgment materials cannot actually be "stricken").

Even if Dr. Pratkanis's opinions could be deemed "helpful," the State has little to say in response to the challenge that they were baseless, and what it does say misses the mark. Br. App. 30-32. Although the State asserts that Dr. Pratkanis's opinions were "credible," on a motion for summary judgment, courts do not weigh evidence or assess witness credibility. *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006). Responding to just one of the many specific criticisms of Dr. Pratkanis's opinions; *i.e.*, that he conducted no surveys or focus groups and interviewed no consumers, Br. App. 14, the State points out that LRO's expert, Dr. Bruno, also did not conduct a focus group. The State evidently forgets that it has the burden of proof on its CPA

claim. *See* RCW 19.86.080(1); *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011).

Tellingly, the State offers *no* response regarding the internal inconsistencies LRO identified in Dr. Pratkanis's opinions. *See* Br. App. 31.

This Court should determine as a matter of law that LRO's solicitation was not likely to mislead reasonable consumers and direct entry of summary judgment in LRO's favor.

B. This Court should reverse the summary judgment granted to the State.

In the event this Court does not direct entry of summary judgment in LRO's favor, it should nevertheless reverse the judgment in the State's favor. For the reasons discussed above and in Appellants' Opening Brief, the State failed to establish as a matter of law that LRO's mailer was likely to mislead reasonable consumers.

1. Capacity to deceive is a fact question that can be determined as a matter of law only if reasonable minds cannot differ.

The State obtained summary judgment based on the premise that capacity to deceive is purely a question of law. RP (2/12/2016) 13-14; CP 327, 1182-83. Because it is actually a question of fact, the summary judgment entered by the superior court cannot stand.

The State fails in its attempt to recharacterize or distinguish some of the cases cited in LRO's Opening Brief holding that "capacity to deceive a substantial portion of the public" is a fact question.[3] Br. App. 20-22. To support its opposite contention, the State divides the test into two elements: (1) capacity to deceive and (2) a substantial portion of the public. The State argues that the first part is always a question of law, while the second part presents a question of fact only where there is a dispute on "whether the unfair or deceptive conduct reached consumers." Br. Resp. 37. This characterization finds no support in Washington law.

The capacity-to-deceive test is a cohesive, one-part test in which the phrase "substantial portion of the public" means "reasonable consumers." As the State acknowledges (Br. Resp. 20-21), the iteration of the test most recently articulated by our Supreme Court is whether a communication is likely to mislead ordinary consumers acting reasonably. *Panag*, 166 Wn.2d at 50 ("Deception exists 'if there is a representation, omission or practice that is likely to mislead' a reasonable consumer.") (quoting *S.W. Sunsites, Inc. v. F.T.C.*, 785 F.2d 1431, 1435 (9th

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[3] *See also* D. DEWOLF, K. ALLEN, D. CARUSO, 25 WASH. PRAC., CONTRACT LAW & PRACTICE § 14:26 (3d ed., updated October 2016) ("Whether an act or practice is unfair or deceptive is ordinarily a question for the fact finder.") (citing *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 700, 106 P.3d 258 (2005) (citing *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 921, 32 P.3d 250 (2001))).

Cir. 1986)).[4] Indeed, F.T.C. Act cases (from which Washington first adopted the capacity-to-deceive test for CPA cases in 1976[5]) have not used the phrase "substantial portion of the public" in over 30 years. The F.T.C. reworded the test in 1983 and now evaluates whether a representation "is likely to mislead consumers acting reasonably in the circumstances." *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (citing *Matter of Cliffdale Assocs.*, 103 F.T.C. 110, 164-65 (1984)

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[4] The State misstates the holding of *Panag*; plainly, the court held that the collection notices at issue were deceptive (as a matter of law) because they were highly misleading, not merely because they were sent to thousands of people. *See Panag*, 166 Wn.2d at 50.

[5] *Fisher v. World-Wide Trophy Outfitters, Ltd.*, 15 Wn. App. 742, 748, 551 P.2d 1398 (1976) ("To constitute a deceptive practice, the advertisement need only have a tendency or *capacity* to deceive a substantial portion of the purchasing public.") (citing *Exposition Press, Inc. v. F.T.C.*, 295 F.2d 869, 872 (2d Cir. 1961)). Notably, in *Fisher*, the appellate court observed that the trial court's determination that the defendant's advertisements were deceptive was a *finding of fact* (deemed a verity as it was unchallenged on appeal). *Id.*

Soon after *Fisher*, also citing federal law, the Washington Supreme Court stated the test simply as "capacity or tendency to deceive." *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 317, 553 P.2d 423 (1976). The Supreme Court first stated the test as "capacity to deceive a substantial portion of the purchasing public" in 1982—just one year before the F.T.C. reworded the test. *See Haner v. Quincy Farm Chemicals, Inc.*, 97 Wn.2d 753, 759, 649 P.2d 828 (1982) (citing *Fisher*, 15 Wn. App. at 748).

(incorporating *FTC Policy Statement on Deception* dated Oct. 14, 1983)).[6]

Even under the test's original phrasing (which our Supreme Court appears now to use interchangeably with the newer phrasing, *see, e.g., Panag*, 166 Wn.2d at 47, 50), quantification of past exposure was not relevant.[7] *See Behnke v. Ahrens*, 172 Wn. App. 281, 291-93, 294 P.3d 729 (2012) (holding that multimillionaires who sought tax shelters could obtain relief under the CPA even if numerically they did not comprise "a substantial portion of the public"). Capacity to deceive is an objective test, meaning it is *forward-looking* and unconcerned with the extent to which the public was exposed to an allegedly deceptive act: "[D]eter[ring] conduct *before* injury occurs" would

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[6] Washington CPA cases demonstrate that the likelihood of misleading reasonable consumers is the essence of the capacity-to-deceive test. *See, e.g., Columbia Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Assocs., PLLC*, 168 Wn.2d 421, 442-43, 228 P.3d 1260 (2010) (holding that doctors telling patients they could receive physical therapy only at one clinic had the capacity to deceive a substantial portion of the public into believing they could not take referrals to other providers); *Indoor Billboard/ Wash., Inc. v. Integra Telecom of Wash.*, 162 Wn.2d 59, 76, 170 P.3d 10 (2007) (holding that the defendant's practice of listing its own surcharges among state and federal taxes on its invoices had the capacity to deceive a substantial portion of the public because reasonable consumers could conclude the surcharge was another tax).

[7] Although a plaintiff need not establish actual deception under the CPA, the number of persons *actually deceived* (as opposed to mere recipients) may at least be relevant to capacity to deceive.

be "frustrated" if deceptiveness turned on "amorphous numerical thresholds established ad hoc."[8] *Id.*

Because quantification of past exposure is not relevant to deceptiveness, it is, contrary to the State's argument, not the essence of the phrase "a substantial portion of the public" and not the "question of fact" referred to in Washington cases (including *Behnke*). Rather, capacity of a communication to deceive is *itself* a question of fact. The State concedes that, under federal cases applying the original capacity-to-deceive test, deceptive capacity was a fact question focusing on how reasonable consumers would interpret advertisements or other representations. Br. Resp. 39; *see also* Br. App. 20, 22 (citing cases). The same is true under the rephrased "likely to mislead" test. *See, e.g., FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 957-58 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008) ("The meaning of an advertisement, the claims or net impressions communicated to reasonable consumers, is a question of fact.").[9]

The State is incorrect that LRO failed to preserve for review whether capacity to deceive is a question of fact or law.

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[8] Extent of exposure is relevant to the public-interest-impact element of a CPA claim. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 790, 719 P.2d 531 (1986).

[9] *Cf. In re Kekauoha-Alisa*, 674 F.3d 1083, 1092 (9th Cir. 2012) (applying Hawaii law) ("Whether a reasonable consumer would likely be misled by a practice is a question of fact unless 'no reasonable person would determine the issue in any way but one.'").

Under RAP 2.5(a), appellate courts "may refuse to review any claim of error which was not raised in the trial court." Here, LRO plainly disputed that the trial court could decide as a matter of law that its mailers were deceptive. For instance, LRO argued that the State's motion could not be granted because it was "rife with questions of fact." CP 1010. In the cases cited by the State, the appellants attempted to raise an entirely new theory of recovery on appeal. *See* Br. Resp. 35. Such is not the case here and, under these circumstances, this Court cannot affirm the summary judgment on the incorrect basis that capacity to deceive is purely a question of law.

Whether a communication has the capacity to deceive a substantial portion of the public or is likely to mislead reasonable consumers is a question of fact under established Washington law.[10] As such, the issue can be determined as a matter of law only if reasonable minds could not differ.

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[10] This is likely why the Washington Supreme Court Committee on Jury Instructions has adopted pattern jury instructions for CPA claims, including the following instruction on determining capacity to deceive:

> In order to prove that [name of defendant] engaged in an unfair or deceptive practice, it is sufficient to show that the act or practice had the capacity to deceive a substantial portion of the public. [Insert name of plaintiff] does not need to show that the act or practice was intended to deceive.

6A WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. 310.08 (6th ed., updated June 2013).

2. The State failed to establish as a matter of law that LRO's mailer was likely to mislead reasonable consumers.

Even assuming certain elements of LRO's mailer could be considered misleading as the State alleged, a reasonable trier of fact could find that other elements (*e.g.*, the disclosures) were sufficiently clarifying to a reasonable consumer. The FTC has explained that the "trier of fact...will evaluate the totality of the ad or practice and ask questions such as: how clear is the representation? how conspicuous is any qualifying information? how important is the omitted information? do other sources for the omitted information exist? how familiar is the public with the product or service?" *FTC Policy Statement on Deception* (Oct. 13, 1983), 103 F.T.C. 110, 181-82 (1984). Applying the "net impression" test necessarily involves weighing all elements of a solicitation, making the issue not susceptible to summary judgment unless reasonable minds could not differ. *Consumer Fin. Prot. Bureau v. IrvineWebWorks, Inc.*, 2016 WL 1056662 at *8-9 (C.D. Cal. 2016).

The State fails to address the conflicts among its recipient declarations or the lack of evidence that the declarants claiming to be deceived actually read the mailer. *See* Br. App. 12-13. This precludes summary judgment for the State. *See Montaney v. J-M Mfg. Co.*, 178 Wn. App. 541, 548, 314 P.3d 1144 (2013) (holding that conflicting witness testimony precluded summary

judgment). *See also FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851, 857-58 (D. Mass. 1992) (denying summary judgment on claim that the representation, "maintenance free," was likely to mislead reasonable consumers where consumer testimony on reliability varied).

The State similarly fails to address the conflicts between the parties' expert declarations. *See* Br. App. 13-14, 31-32. Even assuming Dr. Pratkanis's opinions were admissible under ER 702, a "battle of the experts" on capacity to deceive would preclude summary judgment for the State. *DiBlasi v. City of Seattle*, 136 Wn.2d 865, 879, 969 P.2d 10 (1998); Br. App. 18-19.

Although the State asserts broadly that courts have "questioned the overall efficacy of disclaimers," tellingly, none of the cases the State cites on disclosures or disclaimers was a summary-judgment case decided by the court as a matter of law. *See* Br. Resp. 24-25. And again, disclosures must be considered along with other elements of a solicitation in applying the "net impression" test. *Panag*, 166 Wn.2d at 50; *In re VistaPrint Corp. Mktg. & Sales Pracs. Lit.*, 2009 WL 2884727 at *6-8, 11 (S.D. Tex. 2009). The State defends the trial court's disregarding of the disclosures by citing Dr. Pratkanis's opinion that "a consumer *may* have missed this information or *may* not have understood the full meaning," but the speculative nature of these assertions serves only to illustrate why summary

judgment was inappropriate. Br. Resp. 27, quoting CP 360 (emphasis added).

Contrary to the State's assertion, LRO "misconstrue[d]" no facts or law in stating in its Opening Brief, "Dr. Bruno noted that LRO's complaint rate was 'extremely low' and showed that it was significantly lower than would generally be expected for a marketing communication." Br. Resp. 31; Br. App. 14, quoting CP 1042. Dr. Bruno did in fact state this opinion, observing that the rate of complaints by recipients of LRO's mailer was 97% lower than the average rate in a 2014 study. CP 1042-43. To be sure, Dr. Pratkanis also cited statistical evidence. But he compared a *different* complaint rate—the number of *purchasers of LRO's product* who complained—with an average complaint rate noted in a book published 35 years ago, observing that LRO's rate was "roughly 9 to 10 times" higher (but still less than 0.5% percent!). CP 371. LRO misconstrued nothing. More importantly, the State again only highlights fact issues that should have precluded summary judgment in its favor.

LRO did not "concede" capacity to deceive. Br. Resp. 32. The State points to Mr. Romero's answer to why he thought government agencies investigated LRO.[11] He testified, "[T]hey probably think I am misrepresenting something," suggesting

[11] Nothing in the record indicates that Mr. Romero testified on behalf of LRO under CR 30(b)(6). *See* CP 872, 878.

that, in his view, LRO was *not* misrepresenting anything. CP 881-82. Indeed, the State omits the next sentence of Mr. Romero's testimony, "*But they realize this is not the case*, but they might think it could be." CP 882 (emphasis added). Moreover, when asked directly about capacity to deceive, Mr. Romero repeatedly testified he sought to *avoid* causing confusion:

- "[My] letter states exactly what we're doing and what we intend to do, is offer a service and that we make it very clear with very large letters that we don't want to get it mixed up with a government office," CP 882;
- "Had I wanted to do that [deceive consumers], I wouldn't have placed any of those disclosures that appear because the Indiana law does not oblige me to do that," CP 884; and
- "For me it was very important that there was no doubts when they received the document what it was, and by no means to I want any kind of confusion." CP 873.

CP 873.

This Court should reverse the summary judgment granted to the State.

C. If this Court affirms the determination of CPA violations, it should vacate the penalties in part because the superior court abused its discretion in imposing a $10 penalty for each mailer discarded by a consumer without responding.

Contrary to the State's suggestion, LRO does not dispute that a penalty may be imposed for each CPA violation. Rather,

it disputes the reasonableness of imposing the same penalty for the 96% of the mailers that were discarded as for those that generated a response. This question is analyzed under the *Reader's Digest*[12] factors. *See* Br. App. 41-43.

Challenging the first factor, bad faith, the State criticizes LRO for continuing to do business despite knowing that state regulators were "concerned" about its mailers. Br. Resp. 43. But inquiries and investigations do not mean there is wrongdoing and a business practice must stop. It was far from clear that LRO needed to change anything. The State ignores that a court in Indiana later absolved LRO of any wrongdoing after a trial. CP 994-1007. In good faith, LRO modified its mailer in response to concerns raised by the Washington attorney general's office. *See* CP 748, 913.

Next, on the third factor, ability to pay, the State asserts that LRO's business is "hugely profitable." Br. Resp. 44. Nothing in the record supports this assertion. Appellants object to the State's citation of materials outside the record that was before the trial court when it made its decision (specifically a commercial website and materials pertaining to the State's post-judgment discovery requests). *See* Br. Resp. 45.

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[12] *United States v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955 (3d Cir. 1981).

The State does not respond to LRO's discussion of the remaining *Reader's Digest* factors. If this Court does not reverse the determination of CPA violations, it should vacate the judgment and remand for redetermination of the penalties.

D. This Court should deny the State's request for an award of attorney's fees and costs on appeal.

An award of the State's fees and costs under RCW 19.86.080 is discretionary. Even if this Court were to affirm the judgment, it should exercise its discretion to decline to award additional fees and costs. The State obtained a large judgment without a trial, including a substantial fee award. LRO's appeal raised legitimate issues and concerns regarding the trial court's decision.

III. CONCLUSION

This Court should reverse the judgment and remand for entry of summary judgment in favor of LRO and the Romeros. If further proceedings are necessary on remand, a different judge should be assigned.[13]

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[13] The appellate court will remand to a different judge where the record suggests the original judge would have difficulty overlooking his or her previously stated views or findings. *Ellis v. U.S. Dist. Court*, 356 F.3d 1198, 1211 (9th Cir. 2004).

Respectfully submitted this 24th day of April, 2017.

CARNEY BADLEY SPELLMAN, P.S.

By _____
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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